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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Sara Do,

10 Plaintiff,

11 v.

12 Arizona State University, *et al.*,

13 Defendants.
14

No. CV-22-00190-PHX-JJT

ORDER

15 At issue is Defendant Arizona Board of Regents' (ABOR) Amended Motion for
16 Summary Judgment (Doc. 133, MSJ), supported by an Amended Statement of Facts
17 (Doc. 134 & Doc. 138 (under seal), DSOF). Plaintiff Sara Do filed a Response in
18 opposition to the Motion (Doc. 147, Resp.), accompanied by a Second Amended
19 Controverting Statement of Facts (Doc. 161, PSOF; Docs. 151-1-6 (Pl.'s evidence)), and
20 ABOR filed a Reply (Doc. 163, Reply). The Court resolves the Motion without oral
21 argument. LRCiv 7.2(f).

22 **I. BACKGROUND**

23 Plaintiff enrolled in the Masters Entry to Nursing Practice (MEPN) program at the
24 Edson College of Nursing and Health Innovation at Arizona State University (ASU) in the
25 fall of 2020, during the first year of the COVID-19 pandemic. In December 2020, Plaintiff
26 received a COVID-19 vaccination, and she avers it left her with "worsened arrhythmias
27 (episodes of irregular heartbeats)." (PSOF ¶ 78.) The following spring, she "contacted
28 ASU's Student Accessibility and Inclusive Learning Services (SAILS) office to request

1 accommodations for her arrhythmias, which were exacerbated by stress and lack of sleep.”
2 (PSOF ¶ 79.) Edson faculty provided a number of accommodations to Plaintiff but
3 disapproved certain other accommodation requests because they would not ensure Plaintiff
4 met the core competencies and requirements of the nursing program, such as the clinical
5 rotation requirements, and because the COVID-19 pandemic presented multiple challenges
6 to Edson faculty in providing clinical experiences for students. (*E.g.*, DSOF ¶¶ 4, 9, 10, 11,
7 18, 22, 23, 29, 32, 35, 52, 55.)

8 During the summer of 2021, after Plaintiff missed several clinical rotations in a
9 course numbered NUR 478, Edson faculty proposed to Plaintiff that she take an incomplete
10 in the course so that she could address her health concerns and “pick back up when she
11 was able to do so without the need to retake the full course.” (DSOF ¶¶ 25–27.) Plaintiff
12 “declined to take an incomplete and asked for make-up clinical shifts.” (DSOF ¶ 29.) Edson
13 faculty then arranged make-up clinical opportunities at Defendant Maricopa County
14 Special Health Care District, dba Valleywise Health. (DSOF ¶ 32.) During the first clinical
15 make-up shift on July 24, 2021, Plaintiff avers she experienced arrhythmias, and she left
16 Valleywise before the shift was over and without ensuring anyone knew she was leaving.
17 (PSOF ¶ 103; DSOF ¶¶ 40, 43.) Edson faculty then met with Plaintiff to inform her she
18 would receive a failing grade in NUR 478 for failing to complete the required clinicals.
19 (DSOF ¶ 44.)

20 Plaintiff took a leave of absence from the MEPN program from fall 2021 to fall
21 2022. (DSOF ¶¶ 48, 51.) After the COVID-19 pandemic had eased, she returned to the
22 MEPN program in January 2023 and graduated in August 2023. (PSOF ¶ 109; Doc. 100,
23 Supp. Compl. ¶¶ 2, 22 & n.8.) Plaintiff filed this lawsuit on February 3, 2022 (Doc. 1), and
24 the operative pleadings are the First Amended Complaint (Doc. 13, FAC) and the
25 Supplemental Complaint (Doc. 100, Supp. Compl.).

26 Defendant ABOR governs the Arizona public university system, including ASU,
27 and is the proper litigation party when ASU’s conduct is at issue. *See Lazarescu v. Ariz.*
28 *State Univ.*, 230 F.R.D. 596, 601 (D. Ariz. 2005). As a result of the Court’s Order (Doc. 32)

on ABOR’s motion to dismiss, Plaintiff’s remaining claims against ABOR are as follows: Count 1 – failure to accommodate a disability in violation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132; Count 3 – retaliation or interference with the exercise of ADA rights in violation of Title V of the ADA, 42 U.S.C. § 12203(b); and Count 6 – failure to accommodate a disability in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. (Doc. 13, FAC ¶¶ 59–67, 76–81, 96–100.) ABOR now moves for summary judgment on the remaining claims against it.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(a), summary judgment is appropriate when the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). “A fact is ‘material’ only if it might affect the outcome of the case, and a dispute is ‘genuine’ only if a reasonable trier of fact could resolve the issue in the non-movant’s favor.” *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party’s favor. *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011).

The moving party “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] . . . which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*, 477 U.S. at 232. When the moving party does not bear the ultimate burden of proof, it “must either produce evidence negating an essential element of the nonmoving party’s claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). If the moving party carries this initial burden of production, the nonmoving party must produce evidence to support its claim or defense. *Id.* at 1103. Summary judgment is appropriate against a party that “fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

In considering a motion for summary judgment, the court must regard as true the non-moving party's evidence, as long as it is supported by affidavits or other evidentiary material. *Anderson*, 477 U.S. at 255. However, the non-moving party may not merely rest on its pleadings; it must produce some significant probative evidence tending to contradict the moving party's allegations, thereby creating a material question of fact. *Id.* at 256–57 (holding that the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment); *see also Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." (citation omitted)).

III. ANALYSIS

A. Damages and Equitable Relief

ABOR contends it is entitled to summary judgment on two independent grounds, namely, no damages or other relief remain available to Plaintiff on her claims against ABOR, and Plaintiff cannot identify a genuine issue of material fact demonstrating ABOR's liability under the ADA or Rehabilitation Act. As for damages and other relief, in the FAC, Plaintiff seeks "no less than \$15 million" in compensatory damages as well as injunctive relief and "such other and further relief as this court may deem just and proper."¹ (FAC at 29–30.) The Court will examine the availability of each species of claimed damages and other relief in turn.

1. Compensatory Damages

To begin with, the parties agree that emotional distress damages are not available to Plaintiff as a result of the Supreme Court's decision in *Cummings v. Premier Rehab Keller, PLLC*, 596 U.S. 212 (2022). (MSJ at 4–5; Resp. at 9.) But in her Response (Resp. at 9), Plaintiff argues she also sought compensatory damages in the FAC in the form of lost salary and diminished earning capacity by alleging ABOR

¹ On ABOR's motion to dismiss, the Court dismissed Plaintiff's claim for punitive damages. (Doc. 32.)

1 violated Title II of the ADA by failing to provide reasonable
 2 accommodations to Plaintiff; altering Plaintiff's schedules and requirements
 3 to prevent her from completing her program on the basis of her disability and
 4 retaliating against her for seeking accommodations; denying her the benefit
 5 of the advanced degree she was in the process of earning; and constructively
 removing her from the Masters of Nursing program as a result of the
 disability she suffered as a result of ASU's own vaccination requirements.

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 7 (FAC ¶ 65.) Indeed, in the FAC, Plaintiff also explicitly alleged she suffered "immediate
 8 and long-term reputational harm" and "the loss of a salary of between \$150,000 and
 9 \$300,000 per year that she expected to earn with her Master's degrees." (FAC ¶ 13.)
 10 Although Plaintiff rejoined the MEPN program in January 2023 and graduated later that
 11 year (Supp. Compl. ¶¶ 2, 22 & n.8), Plaintiff now asserts she "was delayed a year and a
 12 half" in "gaining employment as a nurse," entitling her to lost salary on a finding of
 13 ABOR's liability on her Title II or Rehabilitation Act claims. (Resp. at 9.)

14 In reply, ABOR contends that the Court should not permit Plaintiff to seek lost
 15 salary as a sanction under Federal Rule of Civil Procedure 37(c)(1) because she failed to
 16 disclose to ABOR a computation of lost salary in contravention of the requirement to
 17 disclose a "computation of every category of damages claimed by the disclosing party"
 18 under Rule 26(a)(1)(A)(iii). (Reply at 3.) Rule 37(c)(1) provides, where a party fails to
 19 make a required disclosure, "the party is not allowed to use that information . . . to supply
 20 evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified
 21 or is harmless."

22 Plaintiff does not dispute that she never disclosed a computation of lost salary to
 23 ABOR, but she argues her failure to do so was justified because it "was not intentional."
 24 (Resp. at 10.) She further argues her failure to meet the computation-of-damages disclosure
 25 requirement was harmless because her salary has been "fully explored in discovery" and
 26 "caused no prejudice to ABOR." (Resp. at 10.)

27 Plaintiff has not shown her failure to meet the Rule 26(a)(1)(A)(iii) disclosure
 28 requirement was substantially justified. In her Supplemental Responses to ABOR's First
 Set of Special Interrogatories, dated July 6, 2023—well before the 2024 discovery

1 deadlines (Docs. 73, 101)—Plaintiff stated that, “[i]n order to properly calculate [her]
 2 damages, she will require expert testimony to evaluate various factors including the harm
 3 done to her reputation and her earning potential. . . . Plaintiff will provide an updated
 4 calculation of her damages at such time that a calculation is possible once she has retained
 5 an expert and once potentially mitigating factors have played out.” (Doc. 134-8 at 409–10,
 6 DSOF Ex. 36 at 18–19.) It is undisputed that Plaintiff never retained an expert to consider
 7 the factors she identified and never provided a computation of lost salary or any other form
 8 of compensatory damages. And Plaintiff never requested an extension of time to make the
 9 disclosure and now provides no excuse for failing to do so.

10 In an attempt to meet her burden to show the failure to disclose a computation of
 11 her lost salary damages was harmless, Plaintiff states in her Response that her lost salary
 12 “has been explored at length during discovery” and “ABOR has depose Do on this issue”
 13 (Resp. at 9), but Plaintiff provides no citation to a deposition or other discovery in support
 14 of these conclusory statements. *See Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d
 15 1101, 1107 (9th Cir. 2001) (“Implicit in Rule 37(c)(1) is that the burden is on the party
 16 facing sanctions to prove harmlessness.”). The citation Plaintiff does provide is to her own
 17 Declaration, dated August 16, 2024, which states, “I currently earn[] \$42.50 an hour” and
 18 “[a]long with the emotional and physical toll that the Defendants’ conduct took on me, I
 19 also lost at least a year’s worth of income, and also had to deal with having a failing grade
 20 on my transcript.” (Resp. at 9 (citing PSOF ¶ 129; Doc. 151-1, Do Decl. ¶ 28).)²

21 Plaintiff’s statement in her unsigned Declaration is not a computation of a category
 22 of damages under Rule 26(a)(1)(A)(iii). The statement does not provide sufficiently
 23 detailed or reliable evidence from which a factfinder can calculate her alleged lost salary
 24 or diminished earning capacity damages, let alone does it provide ABOR with sufficient
 25 information to prepare a defense to Plaintiff’s damages allegation. Plaintiff herself
 26 represented that, to calculate alleged lost salary, a factfinder would require an expert

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 28 ² The Declaration is unsigned (Doc. 151-1 at 7), such that even if the Court found the statement was an attempt at a computation—which the Court does not find—the statement was not made under penalty of perjury as required by 28 U.S.C. § 1746.

1 opinion as to Plaintiff's reputation and earning potential both at the time she would have
 2 graduated and at the time she did graduate (Doc. 134-8 at 409–10, DSOF Ex. 36 at 18–19),
 3 and a factfinder would also have to consider economic factors such as the job market at
 4 different points in time. The statement Plaintiff made in her Declaration is far from meeting
 5 the essential purpose of the damages computation disclosure rule, and ABOR has suffered
 6 harm in the preparation of its case as a result. *See Mariscal v. Graco, Inc.*, 2014 WL
 7 4245949, at *2 (N.D. Cal. Aug. 27, 2014) (concluding “Plaintiff may no longer seek lost
 8 wages/diminished earning capacity” because the failure to “provide any computation of
 9 lost income or diminished earning capacity . . . has denied Defendant the opportunity to
 10 adequately conduct discovery and prepare a defense on this claim,” and “without such
 11 evidence, Plaintiff can rely only on speculation to prove lost wages or earning capacity”
 12 which “cannot provide a reasonable basis for the computation of damages”); *In re Gorilla*
 13 *Companies, LLC*, 454 B.R. 115, 120 (D. Ariz. Mar. 11, 2011); *Estate of Gonzalez v.*
 14 *Hickman*, 2007 WL 3237635, at *5 (C.D. Cal. June 28, 2007). As a result, Plaintiff has not
 15 shown her failure to meet the Rule 26(a)(1)(A)(iii) disclosure requirement was harmless.

16 In her Response, Plaintiff cites cases stating that exclusion sanctions “should be
 17 imposed only in rare circumstances.” (Resp. at 10 (citing, *inter alia*, *Update Art, Inc. v.*
 18 *Modiin Publ’g, Ltd.*, 843 F.2d 67, 71 (2d Cir. 1988)).) “Rare circumstances” is not a legal
 19 standard; it is a comment of a statistical nature. The Court’s role is to determine whether
 20 Plaintiff has met the requirements of Rules 26 and 37. The Ninth Circuit has recognized
 21 that “[c]ourts have upheld the [exclusion] sanction even when a litigant’s entire cause of
 22 action or defense has been precluded.” *Yeti by Molly, Ltd.*, 259 F.3d at 1106 (concluding
 23 “even though the [party failing to disclose] never violated an explicit court order to produce
 24 the . . . report and even absent a showing in the record of bad faith or willfulness, exclusion
 25 is an appropriate remedy for failing to fulfill the required disclosure requirements of Rule
 26 26(a)”).

27 Thus, as a result of her failure to disclose a computation of her alleged lost salary
 28 damages as required by Rule 26(a)(1)(A)(iii), Plaintiff cannot “supply evidence on a

1 motion, at a hearing, or at a trial” under Rule 37(c)(1) as to this category of damages.³
 2 *Hoffman v. Constr. Protective Servs., Inc.* 541 F.3d 1175, 1179–80 (9th Cir. 2008)
 3 (affirming district court’s exclusion of damages evidence at trial because “[d]isclosure of
 4 damage calculations was mandated under Rule 26(a)”)”; *Yeti by Molly, Ltd.*, 259 F.3d at
 5 1107. Thus, no compensatory damages are available to Plaintiff on her claims.⁴

6 **2. Nominal Damages**

7 The parties also agree that injunctive relief is no longer available to Plaintiff
 8 because, after a three-semester leave of absence, she returned to the MEPN program in
 9 January 2023 and graduated later that year. (MSJ at 3–4; Resp. at 11.) As a result, ABOR
 10 argues that no sources of relief remain for Plaintiff to obtain even if she were to prevail on
 11 liability, rendering her claims moot. (MSJ at 2; Reply at 1 (citing *Foster v. Carson*, 347
 12 F.3d 742, 745 (9th Cir. 2003)).) But Plaintiff contends her catch-all allegation in the FAC
 13 that the Court award “such other and further relief as this court may deem just and proper”
 14 (FAC at 30) entitles her to seek nominal damages such that her claims are not moot. (Resp.
 15 at 11.)

16 **a. Title V of the ADA**

17 With respect to Plaintiff’s claim of retaliation or interference under Title V of the
 18 ADA, such claims are “redressable only by equitable relief” for which “no jury trial is
 19 available.” *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1270 (9th Cir. 2009).
 20 Although no injunctive relief is available to Plaintiff here, she contends that her case is

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 22 ³ The exclusion portion of Rule 37(c)(1) does not require that the Court give the
 23 party failing to disclose another opportunity to be heard, but even if one were required here,
 Plaintiff had and took the opportunity to be heard in her Response. (Resp. at 9–10.)

24 ⁴ As discussed *infra*, compensatory damages are not available on Plaintiff’s claim
 25 brought under Title V of the ADA, but they would be available on her Rehabilitation Act
 26 and Title II claims. Even if Plaintiff had properly disclosed computations of her alleged
 27 compensatory damages, a claim of compensatory damages requires a plaintiff to show the
 28 *mens rea* of deliberate indifference on the part of the defendant in Rehabilitation Act and
 Title II cases. *Csutoras v. Paradise High Sch.*, 12 F.4th 960, 969 (9th Cir. 2021). The Court
 agrees with ABOR (MSJ at 19–21) that, upon review of the evidence, Plaintiff has not
 raised a genuine issue of material fact to show that ABOR acted with deliberate
 indifference such that she would be able to recovery compensatory damages on her
 Rehabilitation Act and Title II claims. Plaintiff’s prayer for compensatory damages fails
 for this additional reason.

1 akin to the “unique circumstances” presented in *Bayer v. Neiman Marcus Group, Inc.*, 861
 2 F.3d 853, 874 (9th Cir. 2017), in which the court concluded that “complete justice may
 3 require a district court to award nominal damages as equitable relief.” There, an employee
 4 of the defendant filed a charge of discrimination with the Equal Employment Opportunity
 5 Commission (EEOC) alleging the defendant interfered with his ADA rights by imposing a
 6 mandatory arbitration agreement. *Id.* The employee waited six years for an EEOC right-
 7 to-sue letter, “including four years *after* the EEOC determined there was reasonable cause
 8 to believe [the defendant] had discriminated against him in violation of the ADA.” *Id.*
 9 Meanwhile, the employee brought a second, similar action against the defendant based on
 10 subsequent conduct, and the district court resolved that case in the employee’s favor, which
 11 decision was affirmed by the Ninth Circuit, essentially mooted the injunctive relief sought
 12 in the first action. *Id.* The district court thus dismissed the first action as moot, since no
 13 injunctive relief was still available, but the Ninth Circuit reversed and remanded, finding
 14 nominal damages can be awarded as an equitable remedy in this context and describing the
 15 arduous path the employee had traveled to seek relief on his claim of ADA interference.
 16 The court concluded that the “unique circumstances of this case illustrate that complete
 17 justice may require a district court to award nominal damages as equitable relief,” and
 18 because the plaintiff had argued he was entitled to nominal damages in opposing summary
 19 judgment, the action was not moot.⁵ *Id.* at 869, 874.

20 The Court agrees with ABOR (Reply at 4–5) that no such unique circumstances
 21 exist here. As a general proposition, “a claim for nominal damages, extracted late in the
 22 day from [the plaintiff’s] general prayer for relief and asserted solely to avoid otherwise
 23 certain mootness, [bears] close inspection.” *Arizonans for Official English v. Arizona*, 520
 24 U.S. 43, 71 (1997); *see also Bayer*, 861 F.3d at 869. It is undisputed that Plaintiff’s Title

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 26 ⁵ In seeking nominal damages as equitable relief for his Title V claim, the plaintiff
 27 in *Bayer*, like Plaintiff in this case, “asserted a claim for . . . such other relief as the district
 28 court deemed proper” and “explicitly argued he was entitled to nominal damages in
 opposing summary judgment before the district court,” such that the Ninth Circuit
 permitted the claim for nominal damages as equitable relief to stand. *Bayer*, 861 F.3d at
 869.

V claim for injunctive relief is moot because ASU and Plaintiff reached an agreement that satisfactorily provided Plaintiff accommodation to complete the MEPN program while ASU was able to uphold the applicable educational standards. Although under *Bayer*, nominal damages are available to a district court as an equitable remedy to ensure a plaintiff receives “complete justice” for the “violation of a statute intended to safeguard civil rights,” *Bayer*, 861 F.3d at 874, nominal damages as equitable relief are not automatic. Where, as here, the parties quickly came to an agreement to address the alleged violation, which achieved the injunctive relief Plaintiff sought within a year of bringing the lawsuit, complete justice does not mandate nominal damages as a matter of equity.⁶ *See id.*; *Brooke v. A-Ventures, LLC*, 2017 WL 5624941, at *5 (D. Ariz. Nov. 22, 2017) (stating that, even if the court were to reach the question of nominal damages as equitable relief, the court would find complete justice did not require them because, unlike in *Bayer*, the defendant “promptly remedied the ADA violation at issue”). Because no source of relief remains, Plaintiff’s claim under Title V of the ADA is moot.⁷ *See Foster*, 347 F.3d at 745; *Garcia v. Ductoc*, 2021 WL 12178446, at *3 (C.D. Cal. Nov. 16, 2021).

b. The Rehabilitation Act and Title II of the ADA

As for Plaintiff’s claims that ABOR failed to accommodate her alleged disability under the Rehabilitation Act and Title II of the ADA, both legal damages and equitable relief are available upon a finding of liability. *See Doherty v. Bice*, 101 F.4th 169, 172–75 (2d Cir. 2024). Plaintiff again concedes emotional damages⁸ and injunctive relief are

⁶ In her Response, Plaintiff also conclusorily argues that she should be entitled to seek nominal damages because, by bringing this lawsuit, she “has revealed broader problems with the way that ABOR and its governed institutions engage with disabled students.” (Resp. at 11.) Plaintiff has proffered no evidence to support that statement, and it is undisputed that this case is grounded in Defendants’ efforts to deal with the changing and uncertain environment of the COVID-19 pandemic and the corresponding emergency measures put into place, particularly in providing health care and, by extension, health care education. (*E.g.*, PSOF ¶¶ 1, 2, 4, 13, 14, 35, 52, 55, 83, 85, 93, 100; DSOF ¶¶ 9, 10, 11, 12, 13, 14, 15, 23, 35, 52, 53, 55.)

⁷ Plaintiff does not argue, and the Court does not find, that the “capable of repetition, yet evading review” exception to the mootness doctrine applies here. *See Foster*, 347 F.3d at 746.

⁸ “Because recovery for emotional damages is unavailable under the Rehabilitation Act’s cause of action, . . . such recovery is likewise unavailable under Title II of the ADA,

1 unavailable, and she never made the required disclosures for lost salary and reputational
 2 harm, so the only remaining possible source of damages is Plaintiff’s now-claimed nominal
 3 damages. The case law after *Bayer* does not clarify whether nominal damages in the context
 4 of the Rehabilitation Act and Title II of the ADA can be a form of equitable relief the Court
 5 can award if complete justice so requires. *See Bayer*, 861 F.3d at 871–73 (stating “nominal
 6 damages may be legal or equitable” and “[c]ompensatory and nominal damages serve
 7 distinct purposes,” where compensatory damages “compensate for a proven injury or loss,”
 8 but “nominal damages are divorced from any compensatory purpose” and instead “are
 9 awarded to vindicate rights, the infringement of which has not caused actual, provable
 10 injury” as well as “to clarify the identity of the prevailing party” (internal quotations and
 11 citations omitted)). To the extent nominal damages can be awarded as equitable relief in
 12 this context, as Plaintiff asserts (Resp. at 12), the analysis under Title V, *supra*, applies
 13 with equal force to these claims; this is not a case in which nominal damages as equitable
 14 relief are merited.

15 Plaintiff argues that “the types of damages recoverable under the [Rehabilitation
 16 Act], and by extension Title II of the ADA, are informed by damages traditionally available
 17 for breach of contract,” and “[n]ominal damages are recognized as a remedy under
 18 traditional contract law.” (Resp. at 11–12 (quoting *Cummings*, 596 U.S. at 226 (internal
 19 quotation marks omitted), and citing the Restatement (Second) of Contracts § 346).) Once
 20 again, Plaintiff does not explicitly seek nominal damages in the FAC and only raises them
 21 now as a source of damages to try to avoid mootness.

22 Plaintiff’s late request for nominal damages extracted from a general prayer for
 23 damages again bears close inspection. *Arizonans for Official English*, 520 U.S. at 71. The
 24 Second Circuit recently considered a case very similar to the present one in which a college
 25 student sought injunctive relief and emotional distress damages against his college under
 26 Title II of the ADA. *Doherty*, 101 F.4th at 170–71. As in the present case, the plaintiff’s
 27 emotional distress damages were unavailable under the Supreme Court’s decision in

28 which explicitly borrows the ‘remedies, procedures, and rights’ of the Rehabilitation Act.”
Doherty, 101 F.4th at 174–75 (citing *Cummings*, 596 U.S. at 219–20).

1 *Cummings* and his request for injunctive relief expired upon his graduation. *Id.* at 171. And
 2 as in this case, throughout the course of the litigation—in that case, five years—the plaintiff
 3 had only pursued damages “grounded in emotional distress” and only asserted that his
 4 generic claim for other damages included those “analogous to breach of contract damages”
 5 when the sources of damages he had pursued were no longer available. *Id.* at 175. That
 6 court affirmed the district court’s decision to grant the defendant’s motion for judgment on
 7 the pleadings, denying the plaintiff’s “unconvincing attempt to reframe the emotional
 8 damages claim as a claim for contractual damages.” *Id.* Although the plaintiff there did not
 9 explicitly raise nominal damages until the appeal, the request for nominal damages arose
 10 from the very breach-of-contract damages he sought too late in the district court.

11 Similarly, here, Plaintiff now seeks nominal damages as a species of “damages
 12 traditionally available for breach of contract.” (Resp. at 11–12.) But Plaintiff never raised
 13 these damages as legal damages in the FAC or throughout discovery, instead pursuing only
 14 emotional distress damages, and she seeks them now only to try to save her Rehabilitation
 15 Act and Title II claims. As the *Doherty* court concluded, this Court finds Plaintiff’s late
 16 request does not pass close inspection in this instance. Accordingly, Plaintiff’s claims
 17 under the Rehabilitation Act and Title II of the ADA are likewise moot.⁹ *See Foster*, 347
 18 F.3d at 745.

19 **B. *Daubert* Motions**

20 ABOR also brought Motions to Exclude testimony of Plaintiff’s experts as to her
 21 alleged emotional distress damages (Doc. 120 (Dr. Taylor); Doc. 122 (Dr. Weiss)) and her
 22 expert as to whether ABOR met the requirements of the ADA (Doc. 121
 23 (Dr. Schwartzberg)). Because the Court finds Plaintiff’s claims against ABOR are moot,
 24 these motions are likewise moot with respect to ABOR. But because Valleywise filed a
 25 Joinder (Doc. 123) to the Motion to Exclude Dr. Weiss’s testimony (Doc. 122), the Court
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 28 ⁹ Because the Court resolved ABOR’s motion on the question of damages, the Court
 did not need to consider the substance of the evidence to which Plaintiff objected (Doc.
 146), and the Court thus overrules those objections as moot.

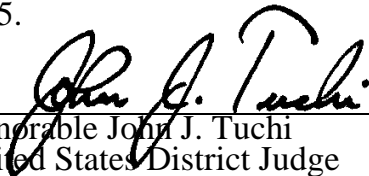
1 will address that Motion in resolving Valleywise's Motion for Summary Judgment
2 (Doc. 116).

3 **IT IS THEREFORE ORDERED** granting Defendant Arizona Board of Regents'
4 Amended Motion for Summary Judgment (Doc. 133).

5 **IT IS FURTHER ORDERED** denying as moot Defendant Arizona Board of
6 Regents' *Daubert* Motion to Exclude Testimony of Dr. Eddie Taylor (Doc. 120).

7 **IT IS FURTHER ORDERED** denying as moot Defendant Arizona Board of
8 Regents' *Daubert* Motion to Exclude Testimony and Report of Dr. Joseph Schwartzberg
9 (Doc. 121).

10 Dated this 20th day of March, 2025.

11 
12 Honorable John J. Tuchi
13 United States District Judge
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